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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

“Amy” et. al.,
Plaintiffs,
v.
RANDALL STEVEN CURTIS
Defendant.

) Case Number: 4:19-CV-02184PJH
) PLAINTIFFS’ NOTICE OF MOTION AND
) PLAINTIFFS’ MOTION TO STRIKE
) SUPPLEMENTAL DECLARATION OF
) DEFENDANT FILED SEPTEMBER 25,
) 2020 OR PORTIONS THEREOF
)
) NOTE ON MOTION CALENDAR:
) Date: November 2, 2020
) Time: 9:00 a.m.
) Judge: Honorable Phyllis J. Hamilton
) Chief United States District Court Judge
)
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)
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)

PLAINTIFFS' NOTICE OF MOTION AND MOTION
TO STRIKE SUPPLEMENTAL DECLARATION OF
DEFENDANT FILED SEPTEMBER 25, 2020
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PLAINTIFF'S NOTICE OF MOTION
AND MOTION TO STRIKE SUPPLEMENTAL DECLARATION OF DEFENDANT
FILED ON SEPTEMBER 25, 2020 OR PORTIONS THEREOF

PLEASE TAKE NOTICE that on November 2, 2020, 2020, at 9:00 a.m. or as soon thereafter as this matter may be heard,

Plaintiffs move the Court, pursuant to Local Rules 7-5 and 7-3(d), for an Order Striking Defendant's Supplemental Declaration (Dkt #120) or Portions Thereof (filed of September 25, 2020 at 5:20 pm) on the grounds that it is irrelevant in its entirety, or that portions of the Declaration are hearsay, mere speculation, or contain argument or are untimely.

This motion is based on this Notice of Motion, the following Memorandum of Points and Authorities, the complete files and records in this action and any other matters that may properly come before the Court for its consideration.

Dated: September 28, 2020.

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CASE NO.: 4:19-cv-02184-PJH

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2 **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES**

3

4 **I. INTRODUCTION**

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6 The contents of Supplemental Defendant's Declaration of Ethan A. Balogh, (Dkt. #120)
7 filed September 25, 2020, is of no relevance to the Plaintiffs' Motion to Strike Affirmative
8 Defenses currently pending. Should the court find some relevance in the Declaration,
9 nevertheless some portions of the Declaration are hearsay and other portions are pure
10 speculation. Attached hereto at Exhibit 1 is a true and correct copy of the Supplemental
11 Declaration with the portions to which Plaintiffs make individualized objections highlighted.
12 The Supplemental Declaration is further untimely as to the pending Motion to Strike Affirmative
13 Defenses.

14 **II. BACKGROUND**

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16 Plaintiffs filed their Reply (Dkt. #111) on the Motion to Strike Defendant's Affirmative
17 Defenses on September 17, 2020. Shortly, thereafter Plaintiffs' counsel Hepburn was informed
18 by AUSA Julie Garcia, who represented the Government in the underlying criminal matter with
19 regard to restitution, that she had a concern that Plaintiffs' filing would be read by this court to
20 say that she had violated Plaintiffs' rights under the Crime Victims Rights Act. Plaintiffs'
21 counsel had no such intent to convey an allegation of improper actions on the part of Ms. Garcia.
22 Plaintiffs' counsel filed her Supplemental Declaration (Dkt. #112) on September 18, 2020 in
23 order to clarify for the record, should there be any question, that no such allegation was being
24 made.

25 Defendant has now filed at Docket Entry #120 a Supplemental Declaration in support of
26 Defendant's Response (ECF 108-1) to Motion to Strike Affirmative Defenses challenging the
27 veracity of Plaintiffs' counsel's assertions and alleging withholding of emails which should have
28 been produced in discovery. Defendant further alleges that such "withheld" emails are germane
to the currently pending Motion to Strike Affirmative Defenses.

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III. LEGAL STANDARD

“Irrelevant evidence is not admissible.” F.R.E. 402.

Local Rule 7-5 provides that Affidavits or Declarations must contain only facts, must conform to the requirements of Fed. R. Civ. P. 56(e), and avoid argument and conclusions.

Hearsay is inadmissible. F.R.E. 802.

Local Rule 7-3(d) provides that:

Supplementary Material. Once a reply is filed, no additional memoranda, papers or letters may be filed without prior Court approval, except as follows:

(1) Objection to Reply Evidence. If new evidence has been submitted in the reply, the opposing party may file and serve an Objection to Reply Evidence, which may not exceed 5 pages of text, stating its objections to the new evidence, which may not include further argument on the motion. The Objection to Reply Evidence must be filed and served not more than 7 days after the reply was filed. Fed. R. Civ. P. 6(d), which extends deadlines that are tied to service (as opposed to filing), does not apply and thus does not extend this deadline.

IV. DISCUSSION

A. The Declaration Lacks Relevance.

Defendant offers the Supplemental Declaration in support of his Response to the Plaintiffs' Motion to Strike Affirmative Defenses. He now alleges withholding of documents in discovery that he claims are pertinent to the pending issues.

Defendant's Supplemental Declaration contains nothing of relevance to the issues about whether the affirmative defenses contained in his Answer to the First Amended Complaint herein are sufficiently pleaded or legally sufficient. Rather, it is further effort to "stir the pot" and gin

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1 up discord between counsel for Plaintiffs' and counsel for the Government in the underlying
2 criminal matter.

3 Defendant is injecting a discovery issue into the pending motion concerning affirmative
4 defenses. Defendant has alerted Plaintiffs to his concern that further emails need be produced in
5 response to his Request for Production of Documents evidencing communications with third
6 parties concerning Defendant. Plaintiffs' counsel are attempting to attend to this inquiry. (See
7 Decl. of Carol L. Hepburn filed herewith). Arguably, given the Magistrate's Order of September
8 8, 2020, Defendant has no right to this information in any event. If there is a discovery concern
9 then the Local Rules give the parties a method for resolving it. Conflating such an issue with the
10 pending motion through a supplemental post-Reply Declaration is not the way to do this.

12 Finally, the emails at Exhibit E and letter at Exhibit F were all available to Defendant at
13 the time of filing his Response to the Motion to Strike Affirmative Defenses (Dkt. #. 107), and
14 have no relevance to proper pleading or legal sufficiency.

16 Plaintiffs' Supplemental Declaration was filed for one reason and one reason only. An
17 attorney practicing before this court felt that a memorandum filed by the Plaintiffs called her
18 conduct into question. The Supplemental Declaration was filed to make clear that such was not
19 the case. Defendant however views this as an opportunity to inject more argument, and improper
20 evidence, into the record. The Declaration filed at Dkt. #120 should thus be stricken in whole.

22 **B. Hearsay**

23 Should the court determine that the Docket #120 Supplemental Declaration of Defendant
24 is not improper as a whole, certain portions of it should nevertheless be stricken as in violation of
25 the Rules of Evidence and Local Rules 7-3(d) and 7-5.

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1 At the top of page 2 of the Supplemental Declaration begins to recite what counsel was
2 allegedly told by AUSA Garcia. It is offered for the truth of the matter asserted. It fails to fit
3 within any exception to the hearsay rules. See F.R.E. 803. This portion should be stricken. (See
4 Ex. 1 p.2, ll.3-15).

5 **C. Argument contained in the Supplemental Declaration.**

6 At page 3, lines 3 to 17, the Supplemental Declaration consists of a request that
7 Plaintiffs' counsel should produce further emails, a statement purporting to explain what is in the
8 attached Exhibit 1 and the argument that it is relevant to the pending motion. These are not facts
9 and should be stricken. (See Exhibit 1 p. 3, ll. 3-17).

10 **D. The Supplemental Declaration attempts to place additional, untimely and
11 improper documents into evidence.**

12 Exhibit E consists of emails produced to Plaintiffs in discovery weeks ago. Exhibit F to
13 the Supplemental Declaration is a letter of January 24, 2018 sent from Plaintiffs' counsel to
14 Defense co-counsel during the underlying criminal case. No reason is offered as to why the
15 emails and this letter were not available to Defendant to include with his Response to the Motion
16 to Strike Affirmative Defenses. The offer of both these exhibits is untimely (Local Rule 7-3(d)).
17 (See Ex. 1, ¶¶5 and 6).

18 Further, the letter is an offer of compromise of the claims asserted in this civil matter and
19 is offered to disprove the validity of the claims. The letter is therefore inadmissible and should
20 be stricken pursuant to F.R.E. 408.

21 **V. CONCLUSION**

22 For the reasons stated above, Plaintiffs respectfully request that the Court grant this
23 motion to strike defendant's supplemental declaration or portions thereof.

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1 Dated: September 28, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2020, I caused a copy of the foregoing to be served upon parties of record via the Court's ECF system.

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